DiMucci Construction Co., Wheeling Construction Co., and Semi Builders, Inc., Joint Employers *and* International Union of Operating Engineers Local 150, AFL–CIO. Cases 13–CA–28930, 13–CA–29294, and 13–CA–29659

May 28, 1993

DECISION AND ORDER

BY MEMBERS DEVANEY, OVIATT, AND RAUDABAUGH

On April 9, 1992, Administrative Law Judge Leonard M. Wagman issued the attached decision. The Respondents filed exceptions, a supporting brief, a response to the General Counsel's answer to the Respondents' exceptions, and a request for oral argument.[1] The General Counsel filed an answer to the Respondents' exceptions. The Charging Party filed cross-exceptions with a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondents, DiMucci Construction Co., Palatine, Illinois, Wheeling Construction Co., Palatine, Illinois, and Semi Builders, Inc., Chicago, Illinois, their officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondents has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

[2] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The Respondents contend, inter alia, that the judge's conduct of the hearing and his findings are tainted with bias, hostility, and prejudice against the Respondents. We find these allegations to be without merit. On our full review of the record and the decision of the judge, we perceive no evidence that he prejudged the case, made prejudicial rulings, or demonstrated bias, hostility, or prejudice against the Respondents counsel or their witnesses. We further find no evidence of partiality in the judge's analysis and discussion of the evidence in his findings.

Ann L. Crane. Esq., for the General Counsel.

Gerard C. Smetana and *Eugene G. Bruno, Esq. (Richman, Lawrence, Mann, Greene and Smetana)*, of Chicago, Illinois, for Respondent DiMucci Construction Co.

David E. Goodrich and *James V. Daffada, Esqs. (Goodrich and Daffada)*, of Naperville, Illinois, for Respondent Wheeling Construction Co.

Robert G. Prorak, Esq., of Chicago, Illinois, for Respondent Semi Builders, Inc.

Louis Sigman. Esq. (Baum and Sigman, Ltd.), of Chicago, Illinois, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LEONARD M. WAGMAN, Administrative Law Judge. This case was tried at Chicago, Illinois, on February 19 and 20, April 2, 3, and 4, May 13, 14, 16, and 17, and June 3, 1991. On a charge filed by the Charging Party, International Union of Operating Engineers, Local 150, AFL–CIO (the Union), on September 20, 1989, a first amended charge filed by the Union on September 21, 1989, and a second amended cbarge filed by the Union on November 6, 1989, the Acting Regional Director for Region 13 issued a complaint in Case 13–CA–28930 on November 24, 1989, which the Regional Director for Region 13 withdrew on December 21, 1989. Also on December 21, 1989, the Regional Director issued a new complaint in the same case, alleging that Respondents DiMucci and Wheeling were joint employers, and had violated Section 8(a)(1) and (3) of the National Labor Relations Act (29 U.S.C. § 151, et seq.) (the Act), by promising benefits, threatening economic reprisals, creating the impression of surveillance, creating the impression that employee organizing efforts were futile, and by discharging employees Fred Beery and Russell Stone.

On the Union's further charge filed in Case 13–CA–29294 on February 21, 1990,[1] the Regional Director issued a further complaint on April 4. This complaint alleged that DiMucci and Wheeling, as joint employers, had violated Section 8(a)(3) and (1) of the Act, by failing to recall employees Tom Sumrall and Larry Cederstrom from layoff. By her order of April 4, the Regional Director consolidated Cases 13–CA–28930 and 13–CA–29294.

On April 5, the Regional Director issued an amended complaint in Case 13–CA–28930, alleging that Respondents DiMucci and Wheeling had committed additional violations of Section 8(a)(1) of the Act by granting wage increases to their employees, threatening them with economic reprisals, including layoff and discharge, interrogating employees regarding their union or protected concerted activities, promising benefits to discourage union activity, creating the impression that employees' union activities were under surveillance, and by creating the impression among their employees that their organizing efforts would be futile.

On May 22, the Acting Regional Director for Region 13 approved an informal settlement between the Union, DiMucci, and Wheeling to resolve consolidated Cases 13–CA–28930 and 13–CA–29294. However, on the Union's charge filed on August 15 and its first amended charge filed on November 7, against DiMucci and Wheeling, and a third Respondent, Semi Builders, Inc. (Semi), the Regional Director, on November 28, set aside the settlement agreement, reissued the complaints in Cases 13–CA–28930 and 13–CA–29294, issued a complaint in Case 13–CA–29659, and con-

[1] All dates are in 1990 unless otherwise indicated.

solidated all three cases. The complaint in Case 13–CA–29659 alleged that DiMucci and Wheeling had violated the settlement agreement and Section 8(a)(3) and (1) of the Act, since on or about April 30, by failing to recall employees Tom Sumrall, Larry Cederstrom, Fred Beery, and Russell Stone from layoff.

DiMucci and Wheeling, by their original answers in Cases 13–CA–28930, 13–CA–29294, and 13–CA–29659 denied committing the alleged unfair labor practices and violating the settlement agreement. On February 21, 1991, DiMucci and Wheeling filed amended answers admitting all the allegations in Cases 13–CA–28930 and 13–CA–29294, but only for the purpose of litigating the issues raised in Case 13–CA–29659. By its answer, Semi denied committing the unfair labor practices alleged in Case 13–CA–29659.

On the entire record, including my observation of the witnesses' demeanor, and after considering the briefs[2] filed by the General Counsel, the Union, and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

DiMucci Construction Co., a corporation, with an office and place of business at Palatine, Illinois, engages in the construction business as a general contractor. During 1990, DiMucci, in the course and conduct of its construction business, purchased and received at its Palatine facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of Illinois.

Wheeling Construction Co., a corporation with an office and place of business at Palatine, Illinois, engages in the construction business as a subcontractor. During 1990, Wheeling, in the course and conduct of its construction business, purchased and received at its Palatine facility products, goods, and materials valued in excess of $50,000 from other enterprises, including DiMucci, located within Illinois, each of which other enterprises had received those products, goods, and materials directly from points outside of Illinois.

At all times material to these cases, DiMucci has administered a common labor policy with Wheeling for Wheeling's employees. At all times material to these cases, DiMucci and Wheeling have been joint employers of Wheeling's employees. I find from the foregoing admitted facts, including the commerce data, that both DiMucci and Wheeling are joint employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Semi Builders, Inc., a corporation, with an office and place of business at Chicago, Illinois, engages in the construction business as a subcontractor. During 1990, Semi, in the course and conduct of its construction business, purchased and received at its Chicago facility products, goods, and materials valued in excess of $50,000 directly from other enterprises, including DiMucci, located within Illinois, each of which other enterprises has received these products, goods, and materials directly from points outside Illinois. I find from these admitted facts that Semi is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The Respondents admitted, and I find, that International Union of Operating Engineers, Local 150, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *DiMucci's and Wheeling's Affirmative Defenses*

In their pleadings, DiMucci and Wheeling contended that the Regional Director lacked authority to enforce the settlement agreement in Cases 13–CA–28930 and 13–CA–29294 on the grounds that its provisions included an unlawful restraint of trade, that the Board's remedial authority under the Act does not include restricting DiMucci ''from going in or out of business,'' and ''that there can be no breach of a settlement agreement when there is no independent violation subsequent to the filing of the agreement of any actionable breach of Section 8(a).'' At the hearing, I rejected these contentions. However, DiMucci has renewed these contentions in the Respondents' posthearing brief. I see no reason to change my ruling.

In an effort to resolve the alleged violations of Section 8(a)(1) and (3) of the Act as recited in Cases 13–CA–28930 and 13–CA–29294, the Acting Regional Director approved an informal settlement between Respondents DiMucci and Wheeling and the Union on May 22. The agreement required that DiMucci and Wheeling post an appended notice to employees and make whole alleged discriminatees Stone, Sumrall, Beery, and Cederstrom, but did not provide a reinstatement remedy. Instead, the settlement agreement, which DiMucci and Wheeling executed on May 7, contained the following:

> DiMucci Construction Co. and Wheeling Construction Co., their officers, directors, and agents, are not presently involved in and will not go back into the excavating and sewer conmtruction business for 18 months from the Date of Approval of the Agreement by the Regional Dirsctor.
>
> DiMucci Construction Co., and Wheeling Construction Co., their officers, directors, and agents, will not for said 18 months subcontract or contract for excavating or sewer construction work with any employer that is a joint employer with either DiMucci Construction Co. and/or Wheeling Construction Co.

The notice to employees appended to and referred to in the settlement agreement declared in pertinent part:

> WE WILL NOT refuse to recall our employees from layoff because of their union or protected activities.
>
> . . . .
>
> WE WILL offer preferential hire to Russell Stone, Fred Beery, Tommy Sumrall, and Larry Cederstrom to their former positions, or if their former positions no longer exist, to substantially equivalent positions, without prejudice, if DiMucci Construction Co. and/or Wheeling Construction Co., jointly or severably, go

[2] Counsel for the General Counsel's motion to correct the transcript of the hearing held in these cases is granted. Accordingly, certain errors in the transcript are noted and corrected.

back into the business of being an excavating or sewer contractor within the next 18 months from the date of the Regional Director's approval of this Settlement Agreement.

On May 14, 1991, at the hearing before me, DiMucci, by its lead counsel, agreed that at the time of the settlement, it had represented that it was no longer doing excavating and sewer construction work and that it had asserted that discontinuance as ground for not offering reinstatement to the alleged discriminatees. (Tr. 953–957.) There is no showing that the Regional Director, the Acting Regional Director, who approved the informal settlement, or anyone connected with the Board, ordered or required DiMucci or Wheeling to discontinue either their excavating or their sewer construction business. Instead, I find that Wheeling and DiMucci asserted this change in their construction operations as an explanation for their declining to reinstate any of the four alleged discriminatees. Accordingly, I further find no factual basis for DiMucci's insistence that the Regional Director or the Board has ordered it to abandon the excavating business for 18 months.

Nor do I find that the Regional Director abused her discretion and exceeded her authority by setting aside the settlement in Cases 13–CA–28930 and 13–CA–29294, reissuing the complaints in those cases, and issuing the complaint in Case 13–CA–29659. Instead, I find that under well-established Board doctrine, the Regional Director's actions were justified.

The Court, in *Wallace Corp. v. NLRB*, 323 U.S. 248, 254–255 (1944), noting the strong policy favoring the settlement of unfair labor practice cases, approved the Board's policy of setting aside settlement agreements which it had previously approved ''where subsequent events have demonstrated that efforts at adjustment have failed to accomplish their purpose, or where there has been a subsequent unfair labor practice.'' In those circumstances, the Board is ''justified in considering evidence as to the [respondent's] conduct both before and after the settlement.'' Id. Consistent with the policy approved in *Wallace*, the Board sets aside settlements where it finds a breach of the agreement or subsequent unfair labor practices by the parties to the agreement. E.g., *Middle Earth Graphics*, 283 NLRB 1049, 1059 (1987).

Here, the Regional Director, has investigated the Union's charge and amended charge in Case 13–CA–29659, alleging that DiMucci and Wheeling had violated the settlement agreement by engaging in the excavation and sewer construction business and failing to offer reemployment to the alleged discriminatees in Cases 13–CA–28930 and 13–CA–29294, and had also violated Section 8(a)(3) and (1) of the Act by failing to recall the alleged discriminatees. Having satisfied herself that there was merit in the Union's allegations, the Regional Director, on November 28, issued a complaint in Case 13–CA–29659, alleging, inter alia, that DiMucci and Wheeling had, since on or about April 30, violated the settlement agreement and Section 8(a)(3) and (1) of the Act, as charged by the Union. I find that the Regional Director's action followed Board policy and was within her discretion. *Soule Glass & Glazing Co. v. NLRB*, 652 F.2d 1055, 1109 (1st Cir. 1981).

B. *DiMucci's and Wheeling's Admissions*

On February 20, 1991, DiMucci and Wheeling, by their amended answers in these cases, admitted all the violations of the Act alleged in the complaints in Cases 13–CA–8930 and 13–CA–29294, but only for the purpose of litigating and deciding the issues raised by the pleadings in Case 13–CA–29659. Based on these admissions, I make the following findings of fact.

1. Supervisors and agents

The following persons are supervisors within the meaning of Section 2(11) of the Act, and agents of their respective employers within the meaning of Section 2(13) of the Act:

Anthony P. DiMucci—Secretary Treasurer of DiMucci
Thomas J. Gimino—President, Secretary-Treasurer, Director and Registered Agent of Wheeling
Ronald Dunbar—General Superintendent of Wheeling
Al Bye—Manager, Wheeling
Cliff Gordon—Chief Mechanic, Wheeling
Salvatore DiMucci—President of DiMucci
Robert DiMucci—Vice-President of DiMucci
Bill Romano—Project Superintendent, Wheeling

2. Interference, restraint, and coercion

I find that by the following conduct, DiMucci and Wheeling violated Section 8(a)(1) of the Act:

(a) On or about August 2, 1989, acting through General Superintendent Ronald Dunbar, at their Mount Prospect Commons construction site: (1) promised benefits of a wage increase and of a wage incentive program to their employees to discourage union support; (2) threatened their employees with loss of jobs for engaging in union or protected concerted activity; (3) created the impression among the employees that their union activities were under surveillance; (4) created the impression among the employees that any attempt to unionize would be futile.

(b) Since on or about July 31, 1989, Wheeling has granted wage increases to employees to discourage union activity.

(c) On or about August 2, 1989, acting through Ronald Dunbar, at their Lake Zurich construction site: (1) asked employees whether they had signed a union card; (2) impliedly threatened employees with discharge because they engaged in union activity; (3) created the impression among employees that any attempt to unionize would be futile.

(d) On or about August 1 or 2, 1989, acting through Ronald Dunbar, threatened employees with discharge for engaging in union or protected concerted activities.

(e) On or about August 2, 1989, acting through Ronald Dunbar, in a parking lot near their Mount Prospect Commons construction site, interrogated employees as to their union or protected concerted activities.

(f) In early August 1989, acting through Bill Romano, in a parking lot adjacent to their Mount Prospect Commons construction site, threatened that employees would be discharged for engaging in union or protected activities.

(g) In early August 1989, acting through Cliff Gordon, at its Mount Prospect Commons construction site, threatened that employees would be discharged for engaging in union or protected concerted activities.

(h) In early August 1989, acting through Anthony DiMucci, at a public restaurant, near the Mount Prospect Commons construction site: (1) threatened employees with discharge for engaging in union or protected concerted activity; (2) created the impression among employees that any attempt to unionize would be futile; (3) interrogated eaployees as to their union sympathies and union activities.

(i) In late August 1989, acting through Cliff Gordon, at their Volo shop, threatened employees with discharge if they engaged in union or protected concerted activities.

(j) In August 1989, acting through Ronald Dunbar, interrogated employees regarding their union or protected activity.

(k) In early August 1989, acting through Anthony DiMucci, at their construction site at Lake Zurich: (1) interrogated employees as to their union sympathies and union activities; (2) promised benefits of a wage increase and of a wage incentive program to employees for the purpose of discouraging union support; (3) threatened employees with layoff if they joined the Union; (4) created the impression among employees that any attempt to unionize would be futile.

(l) In late August 1989, acting through Ronald Dunbar, at their Mount Prospect Commons construction site, threatened employees with layoff if they joined the Union.

(m) In mid-November 1989, acting through Bill Romano, at their Mount Prospect Commons construction site: (1) created the impression among employees that their and other employees' union activities were under surveillance; (2) created the impression among employees that any attempts to unionize would be futile.

(n) In late November 1989, acting through Bill Romano, at their Mount Prospect Commons construction site, threatened employees with discharge for engaging in union or protected concerted activities.

(o) In late November or early December 1989, acting through Cliff Gordon and Bill Romano, at their Mount Prospect Commons construction site, threatened employees with reprisals for engaging in union or protected concerted activities.

(p) On or about December 9, 1989, acting through Bill Romano, at a public restaurant adjacent to their Mount Prospect Commons construction site, threatened employees with layoff for engaging in union or protected concerted activities.

3. Discrimination

I find that DiMucci and Wheeling violated Section 8(a)(3) and (1) of the Act by discharging employees Fred Beery and Russell Stone, respectively, on August 4 and 21, 1989, and by failing to recall employees Tom Sumrall and Larry Cederstrom from layoff since February 28, all because they joined, supported, or assisted the Union, and engaged in concerted activities for the purpose of collective bargaining or other mutual aid or protection, and in order to discourage employees from engaging in such activities or other concerted activities for the purpose of collective bargaining or other mutual aid or protection.

C. *Case 13–CA–29659*

1. The facts

In late 1989 or January, Semi's manager, Pietro Camaci[3] and Wheeling's general superintendent, Ronald Dunbar, met at DiMucci's Braymore construction site and discussed an opportunity for Semi to enter the excavation and sewer construction business. Dunbar told Camaci that DiMucci wanted to get out of that business when Camaci suggested that he was interested in such work, Dunbar laughed and remarked that Camaci knew nothing about the excavation business. Camaci replied that he had done excavation in Italy. Dunbar said he would talk to Camaci later.

In February, General Superintendent Dunbar met Camaci and announced to him that DiMucci had to abandon the sewer and excavating business. Dunbar offered Camaci the opportunity to perform that work for DiMucci. At the same time, Dunbar told Camaci that DiMucci would lease the necessary equipment to Semi. In fact, the equipment lessor would be Fish Lake Equipment Co., a partnership between Anthony, who is the sole owner of DiMucci, and his brother, Salvatore. In January, Fish Lake and Wheeling had executed a similar leasing agreement. Attached to both agreements were identical lists of equipment. During that same month, Semi began performing excavation for DiMucci under an oral agreement at the latter's Cedar Creek and Braymore housing construction site.

In mid-February, Semi employees Geno and Joe Bicari, Pete Camaci's cousins, who mere visiting from Italy, began performing excavating work at DiMucci's Cedar Creek housing construction site. Later in the same month, they also worked at DiMucci's Braymore housing construction site.[4]

During the entire period marked by Geno and Joe Bicari's employment at Braymore and Cedar Creek, Wheeling's general superintendent, Dunbar, was in charge of daily operations at both sites. Dunbar dealt with Pete Camaci daily, regarding inspections and Dunbar's objectives on the job. Dunbar issued daily instructions to Semi's employees regarding what they were to accomplish. If problems arose as to task priorities, or if bad weather was predicted, Dunbar, using his judgment and the authority which Pete Camaci had delegated to him, reassigned Semi's employees and their equipment.

Dunbar directed Geno and Joe Bicari on a daily basis. He did not instruct them in the operation of equipment. He did tell them where he wanted them to work and what they were to accomplish. When Dunbar experienced a language barrier

[3] Semi, in its answer to the complaint in Case 13–CA–29659, admitted that ''Pete'' Camaci is Semi's manager. The record shows that Pietro Camaci is also known as ''Pete.'' Pietro's daughter, Vita Camaci, a Semi employee, credibly testified that her father is ''the manager of Semi Builders.'' Pietro testified that he is a consultant to Semi. However, his testimony regarding his function in Semi's operations showed that he managed its day-to-day construction operations. Accordingly, I find that Pietro is Semi's manager.

[4] In his testimony before me on April 2, 1991, Dunbar stated that Gino and Joe began working at DiMucci's sites in February. This conflicted with Pete Camaci's testimony on April 2, 1991, that Gino began working at a DiMucci site in March, and that Joe did not begin working on the DiMucci sites until April or May. However, as Dunbar seemed more certain of when and where Gino and Joe had worked, I have credited his testimony regarding their employment on DiMucci's sites.

with Geno or Joe, Pete Camaci, who is fluent in Italian, was his interpreter. There were at least six occasions during February, March, and April, when Dunbar used Pete Camaci's language skill to pass directions to Geno, Joe, or both. In May, at Braymore, Dunbar used Pete Camaci as an interpreter to give detailed instructions to Geno and Joe regarding engineering stakes, grades, and elevation.[5] Geno and Joe left Semi's employment and returned to Italy in June or July.

On April 30, DiMucci, as contractor, and Semi, as the subcoutractor, executed a written agreement covering Cedar Creek and Braymore, and providing, inter alia, that Semi was responsible for performing the excavation work at those sites. Anthony P. DiMucci signed for DiMucci and Peter Camaci signed for Semi. The execution of this agreement did not signal any change in the manner in which Dunbar dealt with Semi and its employees.

Neither the signatory employers nor Wheeling invited discriminatees Sumrall, Cederstrom, Beery, or Stone to work either under the oral agreement or under this written agreement. Instead, Semi employed Geno and Joe Bicari, Jeffrey Wilt, James Herron, Darwin Clark, and Richard Swider.

According to Dunbar's credited testimony, on and after April 30, he was ''responsible for all the daily operations of all new construction'' at Cedar Creek and Braymore. In the course of his workday, Dunbar gave ''instructions to employees, subcontractors, just about anyone involved in a particular project or projects so that it can proceed in a timely fashion.'' Dunbar gave instructions to ''[e]mployees of Wheeling, employees of subcontractors, subcontractors themselves. Anybody and everybody involved in the building of a project.''

I also find from Dunbar's credited testimony that before and after April 30, his instructions to Semi's employees related to daily work assignments. Such instructions addressed to individual employees pertained to what Dunbar wanted ''to accomplish today.'' He moved Semi's employees fron one phase of work to another ''to accommodate something so we are not caught in wet weather or freezing weather.'' Dunbar admitted that in carrying out his responsibilities after April 30, he gave instructions on a daily basis to Semi employees ''Jeffrey Wilt, Jim Herron, and Darwin.'' All three were equipment operators engaged in excavating work.

Jeffrey Wilt's credited testimony[6] showed Dunbar's and Wheeling's supervisory control over the daily tasking of Semi's employees. Wilt, who was a Wheeling employee from March 1986 until May 31, operated heavy equipment, doing excavating at the Braymore and Cedar Creek sites. During that period, Dunbar and other Wheeling supervisors directed his work. They told him which site to work at, and gave him work assignments. After May 31, when Wilt first noticed that Semi was issuing his paychecks, Wilt experienced no change in either his work or in his supervision.[7] As of the hearing in these cases, Pete Camaci had never given Wilt any instructions regarding his work.

I also find from Wilt's testimony and the relevant documents received in evidence that Wheeling treated Semi's ex-Wheeling employees as if they had not left Wheeling. Thus,

[5] I drew my findings regarding Dunbar's relationship with Semi's employees and his authority over them from his testimony at the hearing's session on April 2, 1991, and from Pete Camaci's testimony at the session on April 3, 1991.

Their testimony on and after May 16 substantially contradicted their earlier testimony. These changes occurred 3 days after I had mentioned cases which discuss the characteristics of joint employer relationships. I also noted that they gave their earlier testimony in a full and forthright manner, providing details and manifesting an eagerness to provide their best recollections regarding these topics. In contrast, their later testimony consisted largely of responses to leading questions. At one point Semi's counsel asked Pete Camaci to describe how he supervised Semi's employees on DiMucci's sites, and received the following halting response:

> When I went there, I talked to my guys, I see what they are doing. If I—something and tell them to pile the—dirt here, I give directions of what they got to do, how it goes and everything else.

This answer came after four attempts to elicit a description of Pete Camaci's daily supervisory routine. Camaci seemed troubled after each attempt and finally provided the quoted brief response, which came across as a hasty improvisation.

[6] Where Dunbar's or Pete Camaci's testimony conflicted with Wilt's, I have credited Wilt. I have also credited Wilt where his testimony and Semi employee Jim Herron's disagreed. In those instances in which Herron's testimony disagreed with Pete Camaci's or Ron Dunbar's testimony, given prior to May 16, 1991, I have credited Camaci or Dunbar. Of the four witnesses, Wilt impressed me as the most forthright, and seemed to be providing his full recollection. I have reached this assessment of Wilt's credibility despite Ronald Dunbar's testimony suggesting that Wilt testified under pressure from the Union. Thus, according to Ronald Dunbar's uncontradicted and credible testimony, Wilt announced to Dunbar, before testifying, that the Union had pressured him ''so much to testify that [he] had to testify for them.'' Dunbar also related that Wilt said, ''It has got me sick inside.'' However, after this conversation, Wilt testified under oath, freely, and without any suggestion of duress. I have discussed my credibility resolutions regarding Ronald Dunbar's and Pete Camaci's testimony, above, in footnote 5. As for Herron, I noted that on direct examination, DiMucci's counsel used carefully worded leading questions to obtain answers helpful to the Respondents' defense. I also noted that on cross-examination by counsel for the General Counsel, Herron, at times, seemed reluctant to provide information.

[7] Wheeling's Braymore project manager, Roger M. Brock, initially testified on direct examination that beginning on June 1, his only contact with Wilt was social. He also testified that he gave all instructions to Semi's employees through Pete Camaci. According to Brock, even a change of priorities in tasks went through Pete Camaci. He, Brock, would ''always get Pete right on the phone immediately if he ever had changes.'' Brock's testimony did not square with Pete Camaci's credited testimony before me on April 3, 1991, to the effect that he, Pete, does not tell Wilt or Herron what to do because Dunbar is authorized to supervise them. Later in his direct testimony, in response to a leading question from DiMucci's counsel, Brock denied that he had given any instruction to Wilt about excavation work from May 1 to August. The source of the question, its form and content, seriously impaired the probative value of Brock's answer.

Under cross-examination, Brock cast doubt on his credibility by his reticence and reluctance to provide any information. He protested that he could not remember an exact date and would not have answered further, absent counsel's request for an approximate date. He showed a similar reluctance when cross-examined about a conversation. He answered that he could not remember it word-for-word. However, it was Brock's testimony that he could not recall anything about Wilt's and Herron's excavation work or the machines they used after June 1, which convinced me that he was not giving his best recollection. Accordingly, where his testimony conflicts with Dunbar's, Camaci's, or Wilt's credited testimony, I have rejected Brock's testimony.

in August, when Wilt needed some time off because of an injury, he told Wheeling's chief mechanic, Cliff Gordon, who said he would pass the message on to Dunbar. Later in the month, when Wilt sought to return to work, Dunbar instructed him to furnish a doctor's release. On returning to work, Wilt handed the release to Dunbar, who accepted it.

On another occasion in August, Dunbar told Wilt that he was granting a $1 hourly wage increase to Wilt. This wage increase was reflected in a payroll check which Semi issued to Wilt for the week ending September 7.

2. Analysis and conclusions

The decisive issue in these cases is whether DiMucci and Wheeling have been, since February, joint employers of Semi's excavation employees. The Court, in *Boire v. Greyhound Corp*., 376 U.S. 473, 481 (1964), set forth the standard applicable to the resolution of this issue. Under this teaching, the question of whether a respondent qualifies as a ''joint employer'' is one of fact and requires an examination into whether an employer who is claimed to be a ''joint employer'' ''possessed sufficient control over the work of the employees to qualify as a 'joint employer' with [the actual employer].'' 376 U.S. at 481. Accord: *Browning-Ferris Industries*, 259 NLRB 148, 150 (1981), enfd. 691 F.2d 1117 (3d Cir. 1982).

As shown above, General Superintendent Ronald Dunbar, acting on behalf of Wheeling and DiMucci, and with Semi's assent, assigned and directed the work of Semi's excavation employees, and controlled their movement between the Braymore and Cedar Creek construction sites, regularly, on a daily basis, without consulting with Semi. Dunbar exercised this authority during the period covered by the oral agreement, beginning in February, and continued to do so after DiMucci and Semi executed the written agreement on April 30. In addition, DiMucci and Wheeling's treatment of former Wheeling employee Wilt, did not change after Wilt became a Semi employee. For example, in August, Dunbar required Wilt to submit a doctor's release to him before returning to work from 1 week's sick leave. Also, at the end of the same month, Dunbar granted a wage increase to Wilt, which Semi reflected on its payroll. In sum, I find that DiMucci and Wheeling enjoyed sufficient control over Semi's excavation employees to qualify as joint employers under the doctrine expressed in *Boire*. I find, therefore, that since mid-February, DiMucci, Wheeling, and Semi have been joint employers of employees of Semi.

Under the settlement agreement in Cases 13–CA–28930 and 13–CA–29294, DiMucci and Wheeling agreed to reinstate discriminatees Stone, Deery, Sumrall, and Cederstrom, if DiMucci, Wheeling, or both of them, returned to the business of excavation or sewer contracting. As joint employers of Semi's employees, DiMucci and Wheeling have violated the settlement agreement, at least since April 30, by not reinstating the four discriminatees. Thus, the admitted violations of Section 8(a)(3) and (1) of the Act in these two cases remain unremedied.

In determining whether the Respondents violated Section 8(a)(3) and (1) of the Act by failing to recall discriminatees Tom Sumrall, Larry Cederstrom, Fred Beery, and Russell Stone to work at DiMucci's construction sites, I have viewed the facts in light of the Board's test as articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), and approved by the Court in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Under that test, where the General Counsel makes a prima facie showing that an employee's union activity or prounion sentiment was a motivating factor in an employer's decision to discharge, layoff, or otherwise deprive an employee of employment, the employer's adverse action is unlawful unless the employer shows that it would have treated the employee similarly even in the absence of union activity or prounion sentiment. *NLRB v. Transportation Management Corp*., 462 U.S. at 401–403. If the record shows that explanation offered by the employer is pretextual—that the reason either did not exist or was not in fact relied on—the employer has not met its burden and the inquiry is logically at an end. *Transportation Management*, 462 U.S. at 401, 402, fn. 6; *Wright Line*, 251 NLRB at 1084.

Applying the *Wright Line* formula, I am satisfied that DiMucci and Wheeling had a motive for not wanting to reemploy the four discriminatees. Clearly, DiMucci and Wheeling have shown strong willingness to engage in unfair labor practices to get rid of union supporters among their employees. Thus, the record shows that in August, November, and December 1989, DiMucci and Wheeling engaged in an antiunion campaign which included unlawful threats of reprisal against prounion employees. In August 1989, these two respondents discharged union supporters Beery and Stone in violation of Section 8(a)(3) and (1) of the Act. Later, in February, they refused to recall union supporters Sumrall and Cederstrom from layoff, and again violated Section 8(a)(3) and (1) of the Act. In light of DiMucci's and Wheeling's unlawful efforts to rid themselves of the four discriminatees, I find it likely that the prospect of having to reinstate them was obnoxious to DiMucci and Wheeling.

Their assertion that they were no longer in the excavation and sewer construction business provided DiMucci and Wheeling with a settlement agreement excusing them from the unacceptable burden of having the four union supporters in their employ. However, by the time DiMucci and Wheeling had executed that agreement, Semi was performing excavating and sewer construction on DiMucci's Braymore and Cedar Creek sites, but had not recruited any of the four discriminatees to work there. Nor had DiMucci or Wheeling made any effort to advise the four discriminatees of job possibilities at Braymore and Cedar Creek. Given DiMucci's and Wheeling's hostility toward the four union supporters, these circumstances, and the joint employer relationship between DiMucci, Wheeling, and Semi, I find that the General Counsel has made a prima facie showing that the three Respondents were allies in an effort to deny reinstatement to the four discriminatees.

Having rejected the contention that Wheeling and DiMucci were not joint employers of Semi's excavation and sewer construction employees, at the Braymore and Cedar Creek sites, I find that the General Counsel's showing stands unrebutted. Accordingly, I further find that on and after April 30, the Respondents violated Section 8(a)(3) and (1) of the Act, as alleged in Case 13–CA–29659, by refusing to recall employees Beery, Stone, Sumrall, and Cederstrom.

CONCLUSIONS OF LAW

1. By promising a wage increase and a wage incentive program to discourage support for the Union among their employees; threatening or impliedly threatening employees with discharge, layoff, or other reprisals because they engage in union or other protected activity; creating the impression among employees that their union activity, or the union activity of other employees, is under surveillance; creating the impression that any attempt to unionize would be futile; granting wage increases to employees to discourage union activity; interrogating employees regarding their union activity or sympathy; and asking employees whether they had signed union cards, joint employers DiMucci Construction Co. and Wheeling Construction Co. engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

2. By discharging employees Fred Beery and Russell Stone, respectively, on August 4 and 21, 1989, and by failing to recall employees Tom Sumrall and Larry Cederstrom from layoff since February 28, because they supported the Union, joint employers DiMucci Construction Co. and Wheeling Construction Co. violated Section 8(a)(3) and (1) of the Act.

3. By failing to recall employees Fred Beery, Russell Stone, Tom Sumrall, and Larry Cederstrom since on or about April 30, because they supported the Union, joint euployers DiMucci Construction Co., Wheeling Construction Co., and Semi Builders, Inc. violated Section 8(a)(3) and (1) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that they must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondents DiMucci and Wheeling having discriminatorily discharged employees Fred Beery and Russell Stone, and having discriminatorily failed to recall Tom Sumrall and Larry Cederstrom from layoff, DiMucci and Wheeling must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge or entitlement to recall to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondents, DiMucci, Wheeling, and Semi, having discriminatorily failed to recall employees Sumrall, Cederstrom, Beery, and Stone from layoff since April 30, must offer them reinstatement and make them whole in the manner set forth in the preceding paragraph.

I shall also recommend that the Respondents, DiMucci and Wheeling, be required to remove from their files any references to the discharges which I have found violative of the Act, as set forth above, and notify the employees who were discharged, in writing, that they have done so and that they will not use the discharges against them in any way.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[8]

ORDER

A. Respondents DiMucci Construction Co. and Wheeling Construction Co., Palatine, Illinois, their respective officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, failing to recall from layoff, or otherwise discriminating against any employee for actively assisting, or supporting, or in order to discourage employees from engaging in such activities in support of, the Union, International Union of Operating Engineers, Local 150, AFL–CIO, or any other labor organization.

(b) Promising benefits of a wage increase or of a wage incentive program, or granting a wage increase or any other benefits to discourage employees from supporting the Union or any other labor organization.

(c) Threatening, or impliedly threatening, employees with loss of jobs, discharge, layoff, or other reprisals because they support the Union, or any other labor organization, or engaging in other concerted activity protected by the Act.

(d) Creating the impression among their employees that the employees' union activities are under surveillance.

(e) Creating the impression among their employees that any attempt to unionize would be futile.

(f) Interrogating employees as to their union activity or sentiment, or as to other concerted activity protected by the Act.

(g) Asking employees if they have signed an authorization card for the Union or for any other labor organization.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Fred Beery, Russell Stone, Tom Sumrall, and Larry Cederstrom immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(b) Remove from their files any reference to the unlawful discharge of Fred Beery and Russell Stone and notify them in writing that this has been done and that the discharge will not be used against them in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at their construction sites in the Chicago, Illinois metropolitan area copies of the attached notice marked ''Appendix A.''[9] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the

[8] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[9] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

B. Respondents DiMucci Construction Co., Palatine, Illinois, Wheeling Construction Co., Palatine, Illinois, and Semi Builders, Inc., of Chicago, Illinois, their respective officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recall employees from layoff or otherwise discriminating in any manner against any of their employees in regard to their hire and tenure of employnent or any term or condition of employment because they have actively assisted or supported International Union of Operating Engineers, Local 150, AFL–CIO or any other labor organization, or in order to discourage employees from engaging in such activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Tom Sumrall, Larry Cederstrom, Fred Beery, and Russell Stone immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them in the manner set forth in the remedy section of the decision.

(b) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(c) Post at their construction sites in the Chicago, Illinois metropolitan area copies of the attached notice marked ''Appendix B.''[10] Copies of the notice, on forms provided by the Regional Director for Region 13, after being signed by the Respondents' authorized representative, shall be posted by the Respondents immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material.

(d) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondents have taken to comply.

[10] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

> To organize
> To form, join, or assist any union
> To bargain collectively through representatives of their own choice
> To act together for other mutual aid or protection
> To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or refuse to recall you from layoff or otherwise discriminate against any of you for supporting the Union, International Union of Operating Engineers, Local 150, AFL–CIO or any other union, or to discourage you from doing so.

WE WILL NOT promise benefits of a wage increase or of a wage incentive program, or grant a wage increase or any other benefits to discourage you from supporting the Union or any other labor organization.

WE WILL NOT threaten, or impliedly threaten, you with loss of jobs, discharge, layoff, or other reprisals because you support the Union, or any other labor organization, or engage in other concerted activity protected by Section 7 of the Act.

WE WILL NOT create the impression among you that we are keeping your union activities or the union activities of other employees under surveillance.

WE WILL NOT create the impression among you that any attempt by you to unionize would be futile.

WE WILL NOT coercively question you about your union activity or sentiment, or as to other concerted activity protected by Section 7 of the Act.

WE WILL NOT coercively ask you if you have signed an authorization card for the Union or for any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Fred Beery, Russell Stone, Tom Sumrall, and Larry Cederstrom immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

WE WILL remove from their files any reference to the unlawful discharge of Fred Beery and Russell Stone and notify them in writing that this has been done and that the discharge will not be used against them in any may.

DIMUCCI CONSTRUCTION CO. AND WHEELING CONSTRUCTION CO.

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To act together for other mutual aid or protection
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WE WILL NOT discharge, refuse to recall you from layoff, or otherwise discriminate against any of you for supporting International Union of Operating Engineers, Local 150, AFL–CIO, or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Tom Sumrall, Larry Cederstrom, Fred Beery, and Russell Stone immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and WE WILL make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them.

DIMUCCI CONSTRUCTION CO.; WHEELING CONSTRUCTION CO.; SEMI BUILDERS, INC.